ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Tariff Filing Requirements for Interstate Common Carriers	)	CC Docket No. 92-13

REPLY COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

Genevieve Morelli
Vice President and General Counsel
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202)296-6650

Richard E. Wiley
Danny E. Adams
Rachel J. Rothstein
of

WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202)429-7000

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The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits its reply comments in the above-captioned proceeding. As the many comments clearly demonstrate, the Commission's forbearance policy for non-dominant interexchange carriers is well within the agency's lawful discretion under the Communications Act and should be retained. Since its inception 10 years ago, the policy has brought substantial benefits to the public by eliminating entry barriers and successfully promoting competition and the ensuing innovations and efficiencies of the marketplace. The comments in this proceeding provide ample support for the legal, factual and policy justifications underpinning the forbearance policy.

SUMMARY

Finding that small, competitive carriers lacked the market power needed to charge unjust or unreasonable rates or to discriminate unduly, the Commission in 1982 decided to refrain from applying burdensome tariff and facilities

authorization requirements on those non-dominant carriers.[1] The Commission's policy has been in effect for almost ten years, and -- as evidenced by the broad array of parties that filed comments in this proceeding -- has brought about many beneficial changes to the telecommunications marketplace.

A few parties have now questioned the legality of the Commission's longstanding policy. These doubts are raised in light of a Supreme Court case striking down an Interstate Commerce Commission policy forbidding carriers from collecting their tariffed rates where individual contracts had set lower charges to end users. However, as demonstrated in the comments, the Maislin[2] decision did not consider rules similar to the FCC's forbearance policy, nor did it analyze the legality of a forbearance scheme in light of the

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[1] See Policy and Rules Concerning Rates for Competitive Common Carrier Services, 77 F.C.C.2d 308 (1979) (Notice of Inquiry and Proposed Rulemaking) [hereinafter NPRM]; 85 F.C.C.2d 1 (1980) (First Report and Order) [hereinafter First Report and Order]; 84 F.C.C.2d 445 (1981) (Further Notice of Proposed Rulemaking); 91 F.C.C.2d 59 (1982) (Second Report and Order) [hereinafter Second Report and Order], recon. denied, 93 F.C.C.2d 54 (1983); 47 Fed. Reg. 17,308 (1982) (Further Notice of Proposed Rulemaking); 48 Fed. Reg. 28,292 (1983) (Third Further Notice of Proposed Rulemaking); 48 Fed. Reg. 46,791 (1983) (Third Report and Order); 95 F.C.C.2d 554 (1983) (Fourth Report and Order) [hereinafter Fourth Report and Order]; 96 FCC 2d 922 (1984) (Fourth Further Notice of Proposed Rulemaking); 98 F.C.C.2d 1191 (1984) (Fifth Report and Order); 99 F.C.C.2d 1020 (Sixth Report and Order) [hereinafter Sixth Report and Order], rev'd, MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[2] Maislin Industries, U.S. v. Primary Steel, Inc., 110 S.Ct. 2759 (1990).

Communications Act. Thus, Maislin is not controlling here and does not warrant a revision of existing Commission policy.

In short, the Commission's forbearance policy has been a strong force in paving the way to competition in the telecommunications industry. It would not only be unwise, but inconsistent with the public interest, to abandon this policy before it has completed the transition to a fully competitive marketplace. As evidenced by the comments, the Commission's current forbearance policy should remain in place.

I. THE COMMISSION POSSESSES THE LEGAL AUTHORITY TO CONTINUE ITS FORBEARANCE POLICY

Over 35 parties filed comments in response to the Commission's Notice.[3] Of these parties, only five argued that the Commission may lack the legal authority to continue its forbearance policies.[4] These parties rely solely on an overly narrow reading of the Communications Act and an overly broad interpretation of the Supreme Court's Maislin decision. The great bulk of the comments demonstrate, however, that not only does the Commission have broad flexibility under the Act

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[3] Tariff Filing Requirements for Interstate Common Carriers, 7 FCC Rcd 804 (1992).

[4] See Comments of AT&T, NYNEX Telephone Companies, Alascom, Inc., US, West Communications, Inc., and Mobile Marine Radio, Inc.

to forbear from certain regulatory specifications, there is clear Congressional support for the Commission's policies. The forbearance scheme thus does not offend any legal or statutory requirements and should be maintained.

A. Communications Act Authority

The Act's tariffing language expressly provides the Commission with authority to modify a carrier's filing requirements. Section 203(b)(2)[5] authorizes the Commission to modify the requirement found in Section 203(a)[6] that every carrier file and keep open for public inspection rate schedules. As discussed by MCI's comments, "the term 'modify' plainly refers to any provision in Section 203, including Section 203(a)." Thus, the Commission was well within its authority when deciding to forbear from applying some Section 203 requirements on non-dominant carriers.

This modification of Section 203(a) does not carry over to other sections of the Act. The Commission's forbearance rule "merely alters the method by which the Commission ensures that non-dominant carriers comply with their

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[5] "The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (a) to be more than one hundred and twenty days." 47 U.S.C. § 203(b)(2) (1988).

[6] 47 U.S.C. § 203(a) (1988).

obligations under Sections 201(b) and 202(a) of the Act; it does not eliminate those obligations."[7] Thus, the policy is consistent with the Act's other Title II requirements, while using Section 203(b)(2) to tailor the tariff filing procedures for special circumstances -- such as the introduction of competitive services. Arguments that the Commission has eliminated Title II requirements for non-dominant carriers thus are incorrect.

Furthermore, the Communications Act provides the Commission with broad discretion in choosing how to regulate carriers under its authority. Section 4(i)[8] gives it the authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act as may be necessary in the execution of its functions."[9] This section is critical to the proper operation of the Act in that "it affords the Commission sufficient regulatory tools to adapt its regulatory approaches to unforeseen circumstances."[10] Although in 1934 the Congress could never have envisioned today's varied telecommunications marketplace, it was foresighted enough to anticipate the growth of telecommunications technology and

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7 Comments of MCI Telecommunications Corp. at 7.

8 47 U.S.C. § 154(i) (1988).

9 Id.

10 Comments of GTE Service Corporation at 8-9.

provided the Commission with flexibility in adjusting its regulatory approach accordingly.

B. Congressional Authority

The record is replete with discussions of the numerous Congressional hearings and reports addressing the Commission's forbearance policies.[11] While CompTel will not burden the Commission with a lengthy restatement of this statutory precedent, it does wish to highlight some of the many occasions in which Congress acknowledged the Commission's forbearance policies, and to address the significance of the lack of any debate or legislative proposals to overturn the Commission's regulatory approach:

- 1980 - H. Rep. No. 96-1252, 96th Cong., 2d Sess., at 113 (1980). House Interstate and Foreign Commerce Committee releases report recognizing the FCC's Competitive Carrier proceeding and providing additional support for deregulating carriers.

- 1981 - S. 898 - the Telecommunications Competition and Deregulation Act of 1981. Proposed Senate rewrite of portions of the Communications Act making the Commission's deregulatory authority more explicit.

- 1982 - H.R. Conf. Rpt. No. 765, 97th Cong., 2nd Sess. at 56 (1982). In amending the Communications Act to provide for regulation of private land mobile services, Congress specifically stated that nothing in the amended section should be construed as prohibiting the Commission from forbearing from regulation of common carrier land mobile services.

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[11] See Comments of MCI Telecommunications Corp. at 23-44; Comments of GTE Service Corp. at 23; Comments of Cellular Telecommunications Industry Association at 14.

- 1985 - House considers legislation introduced by Congressman John Bryant which would have prevented application of the Commission's forbearance policies to AT&T.

- 1988 - Pub. L. No. 100-594. Communications Act amendment setting deadlines by which the Commission is required to complete tariff investigations. No discussion of or amendments to the Commission's forbearance policy took place.

- 1990 - Pub. L. No. 101-435. Congress enacted special requirements for common carriers offering operator services. The requirements adopted some of the Commission's forbearance policies, including a provision requiring these carriers to file only "informational" tariffs. The Commission has the authority to dispense with these tariffs after four years.

The relevance of this Congressional activity is that it provides a clear indication of the accuracy of the agency's statutory interpretation. The Supreme Court has accorded particular deference to the administrative construction of statutes in light of tacit Congressional endorsement, and other courts generally rely on the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction."[12]

Congress has continuously been made aware of the Commission's policies, both through its own investigations and by the repeated testimony of others at Congressional

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[12] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969) (footnotes omitted).

hearings. Obviously, if Congress disagreed with the Commission's approach, or believed that it lacked the authority to undertake its forbearance policy under the existing mandate of the Communications Act, it would have, at a minimum, warned the Commission of its disapproval. No such actions have ever occurred. This failure to object despite many opportunities, surely indicates Congressional approval of the Commission's forbearance policies.

C. The Courts

At the heart of AT&T's original complaint,[13] and the impetus of the Commission's Notice, is the recent Supreme Court ruling in Maislin. According to AT&T, Maislin "conclusively establishes that the Commission does not have authority to exempt or excuse any common carrier from compliance with the mandatory rate-filing requirements of Section 203."[14] Obviously, regardless of any other arguments offered by those now opposing the Commission's forbearance policy, Maislin is the one factor which they believe absolutely makes the Commission's policies

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[13] AT&T Communications v. MCI Telecommunications Corp., 7 FCC Rcd 807 (1992).

[14] Comments of AT&T at 6-7. See also, Comments of NYNEX Telephone Companies at 7.

illegal.[15] However, as thoroughly addressed by many of the commenting parties, Maislin is based on an Interstate Commerce Commission ("ICC") policy that is quite different from any regulations enacted by this Commission. Thus, while the case may set some limits for the Commission and other regulatory agencies, it does not require the wholesale abandonment of the forbearance policy.

Maislin considered the abdication of a longstanding regulatory policy known as the "filed rate" doctrine. This doctrine is "limited to a situation in which there is a 'filed rate' and where the common carrier charges a shipper or other customer a rate which is different from that 'filed rate.'"[16] Obviously, this policy is not akin to the Commission's voluntary forbearance regulations which "involves a situation where an agency grants certain carriers -- in this case non-dominant carriers -- the right to forbear from filing tariffs at all."[17]

Moreover, the Commission's forbearance policies, unlike those examined in Maislin, do not represent a complete

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[15] CompTel can only assume that if those opposing the Commission's forbearance policy had other legitimate grounds in which to support their position, they would have challenged the policy when originally adopted by the Commission.

[16] Comments of Sprint Communications Company L.P. at 7.

[17] Id. at 7.

abdication of its statutory responsibilities. In Maislin, the Court found that the ICC could not effectively complete its statutory mission if it failed to regulate any carriers under its authority. Here, the Commission continues to apply full Title II regulation to one dominant carrier, AT&T, thereby assuring that the market leader charges rates that are just and reasonable. Because smaller, non-dominant carriers do not have the ability or incentive to price services above the dominant carrier, the Commission is maintaining its ability to enforce all statutory requirements while eradicating overly burdensome and unnecessary barriers to entry for non-dominant carriers.

Other opposing parties suggest that the U.S. Court of Appeals ruling in MCI Telecommunications Corp. v. FCC[18] supports their view that the Commission cannot excuse common carriers from the rate filing requirements of Section 203.[19] However, a close examination of this case reveals that it is not inconsistent with the Commission's voluntary forbearance policy, but rather only struck down the Commission's mandatory detariffing policy, which prohibited non-dominant carriers from filing rate schedules. The court expressly

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[18] 765 F.2d 1186 (D.C.Cir. 1985).

[19] See Comments of NYNEX Telephone Companies at 6; Comments of US West Communications, Inc. at 3.

declined to consider the issue of permissive tariffing[20] because it was not properly before the court.

II. PUBLIC INTEREST CONSIDERATIONS WARRANT CONTINUATION OF THE COMMISSION'S FORBEARANCE POLICIES

The number and variety of parties commenting in this proceeding evidences the success of the Commission's pro-competitive policies. Many of these companies would not be in existence today were it not for the Commission's policy of encouraging competition in the telecommunications marketplace through the lifting of unnecessary and burdensome regulations. The forbearance policy has played a key role in fostering the development of competition in many markets. This competition has brought new and improved services to the public at lower prices than could have been imagined in 1983. Clearly, these initiatives are in the public interest and should be maintained.

Twenty four parties testified as to the legality and prudence of the Commission's forbearance policies. Indeed, a review of these 'supporting' comments are testimony to the success of the Commission's forbearance policy.[21] Companies

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[20] 765 F.2d at 1196.

[21] "The forbearance policy, and nondominant carriers' practices under than policy, have been essential ingredients of the thriving competition that has grown up in the interexchange marketplace." Comments of Ad Hoc

(continued...)

such as Williams Telecommunications, ACC Long Distance Corp., and U.S. Long Distance Inc. all currently compete with AT&T in the provision of interstate telecommunications service. Such wide-scale competition did not exist before adoption of Competitive Carrier. Even companies such as Southwestern Bell, Pacific Telesis and GTE Service Corp., all considered dominant carriers for their provision of certain services, concluded that the forbearance policy was within the Commission's legal authority.

As addressed by many of the parties, "industry conditions are vastly different now from what they were in 1934 . . . ."[22] The number of interexchange carriers has dramatically increased,[23] prices have decreased by more than 40 percent,[24] and new services such as cellular and competitive access have come into the market. The Commission's policies have allowed

> "nondominant common carriers . . . to make rapid, efficient responses to changes in demand and cost;

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[21](...continued)
Telecommunications Users Group at 1; "[T]he Commission's 1986 decision to forbear from regulating RCC's [radio common carriers] interstate services was not only sound public policy, but was at least implicitly authorized by Congress three years before." Comments of Telocator at 3.

[22] Comments of OCOM Corporation at 27.

[23] Id. at 27.

[24] Comments of the CompTel at 5. See also, Comments of Telecommunications Marketing Association at 5; International Communications Association at 2.

> bargain with customers over rates and adjust rates quickly to market conditions . . . and price competitively.[25]

The forbearance policy has promoted the rapid deployment and development of competitive services to the public. By lowering barriers to entry and eliminating unnecessary tariff filing burdens for smaller market participants, the Commission has fostered competition and furthered its statutory goal of ensuring a "rapid, efficient Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges."[26] This success is particularly noteworthy in light of the Commission's mandate to bring new and innovative services to the public.[27] Despite these improved market conditions, however, AT&T continues to retain its dominance. Thus, the Commission must continue its regulatory oversight to ensure the Communications Act's goals.

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[25] Comments of the International Communications Association at 5. "Such a resource-conserving approach is particularly appropriate in times of vastly increasing numbers of tariffs, declining resources available for regulation and the continued availability of the complaint process as a check on aberrational filings." Comments of OCOM Corporation at 28.

[26] 47 U.S.C. § 151 (1988).

[27] 47 U.S.C. § 157 (1988).

III. THE COMMENTS SUPPORT THE USE OF FURTHER STREAMLINED MEASURES FOR NON-DOMINANT CARRIERS SHOULD FORBEARANCE BE ELIMINATED

The comments clearly provide the Commission with the factual and legal support to continue its forbearance policy. However, in the event the Commission finds that it does not have the authority to continue its pro-competitive stance, and thus rules that all carriers must file tariffs, CompTel and others[28] urge the Commission to adopt further streamlining for non-dominant carriers to ensure that any new tariffing requirement be limited to the minimum required by statute.

Specifically, the Commission should, for non-dominant carriers: 1) adopt a one-day notice period;[29] 2) reduce filing fees for non-dominant carriers;[30] and 3) allow for the provision of a maximum or banded-rates in tariff filings. The Communications Act clearly provides for such modifications to the tariff filing requirements in Section 203(b)(2), and the Commission "has considerable discretion to

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[28] See Comments of Metropolitan Fiber Systems at 14; Comments of Williams Telecommunications Group, Inc. at II; Comments of Telecommunications Marketing Association at 9; Comments of First Financial Management Corp. at 13; Comments of the Association for Local Telecommunications Services at 8.

[29] Comments of Ad Hoc Telecommunications Users Group at 19.

[30] Comments of Williams Telecommunications Group at 12.

establish the parameters by which justness and reasonableness are measured."[31]

IV. CONCLUSION

The comments overwhelmingly demonstrate that the forbearance policy is well within the Commission's legal authority and has been largely responsible for the competitive marketplace beginning to develop in interexchange telecommunications. In order to avoid the application of Maislin, however, the Commission must continue to subject AT&T to the full panoply of regulation as contemplated by the

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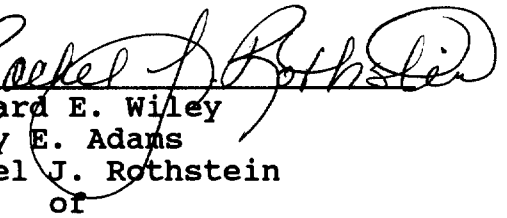
[31] Comments of the Cellular Telecommunications Industry Association at 7, quoting Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd at 2873, 3109-11 (1989), Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786, 6823 (1990).

Act. At a minimum, the Commission should institute a policy of maximum streamlining for non-dominant carriers, should it decide to abandon its forbearance policy.

Respectfully submitted,

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

By: 
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Danny E. Adams
Rachel J. Rothstein
of

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